(2) 95-574

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

JOSE OLIVO,

Petitioner,

v.

DAVID K. MAPP, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Was Respondent Sheriff Mapp entitled to qualified immunity when a Virginia Sheriff in his position could reasonably have believed that he could discharge one of his deputies for disloyalty?

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No. 95-574

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSE OLIVO,

Petitioner,

v.

DAVID K. MAPP, JR.

Respondent.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent David K. Mapp, Jr. respectfully requests this Court to deny the

petition for a grant of certiorari filed by Petitioner Jose Olivo on October 3, 1995.

JURISDICTIONAL STATEMENT

The Petitioner brought this action pursuant to 42 U.S.C. § 1983 alleging that he was discharged in violation of his First Amendment rights. Jurisdiction in the District Court was found at 28 U.S.C. §§ 1331 and 1343. The United States District Court for the Eastern District of Virginia, Norfolk Division denied Respondent's Motion for Summary Judgment based on the doctrine of qualified immunity. The Respondent appealed to the Fourth Circuit Court of Appeals. In an unpublished per curiam opinion, the Fourth Circuit granted Respondent's Motion for Summary Judgment. The Petitioner now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Respondent incorporates by reference the Statement of the Case issued by the United States Court of Appeals For The Fourth Circuit in Olivo v. Mapp, No. 94-2279, slip op. (4th Cir. June 8, 1995).

ARGUMENT

Given the state of federal and Virginia law at the time of Olivo's discharge, a reasonable person in Sheriff Mapp's position could reasonably (and

correctly) have concluded that discharging a deputy for disloyalty was a legitimate exercise of his mandate to maintain discipline and promote unity within the force.[1] Accordingly, the Fourth Circuit correctly granted Sheriff Mapp immunity from suit.

The proper application of the First Amendment to any given factual situation is rarely easily discerned. Applying the First Amendment in the context of public employment is particularly vexing, even for courts, because proper application requires courts to find the proper balance between two conflicting societal values: the individual's right to free speech and the public's right to the efficient provision of public services by its government. This latter right is particularly valued when the public employer is a paramilitary organization such as a Sheriff's Department. Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986), cert. denied, 479 U.S. 848 (1986).

In cases such as the instant one where the Court must engage in an intricate balancing exercise, immunizing the public official from suit is clearly appropriate. In Harlow v. Fitzgerald, 457 U.S. 800, 818

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[1] Sheriff Mapp maintains that he discharged Olivo because of several reports he received that Olivo had abandoned his post. For summary judgment purposes, however, Olivo's factual allegations are taken as true.

(1982), the United States Supreme Court explained that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (emphasis supplied); see also Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992), cert. denied, _____ U.S. ___, 113 S. Ct. 1048 (1993). A right is clearly established only if "[t]he contours of the right [are] . . . sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Thus, whenever "there is a legitimate question as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity." Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994).

I. THE FOURTH CIRCUIT CORRECTLY FOUND SHERIFF MAPP TO BE ENTITLED TO QUALIFIED IMMUNITY UNDER THE CONNICK-PICKERING TEST.

Public employees may not avoid the consequences of a discharge solely by invoking their right to free speech. Under the test articulated by the United States Supreme Court in Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of

Education, 391 U.S. 563 (1968), courts hearing First Amendment claims from discharged public employees must first consider whether the speech involved implicates a matter of public concern.[2] For speech to implicate a matter of public concern, the speech must be related to a "matter of political, social, or other concern to the community...." Connick, 461 U.S. at 146. Absent highly unusual circumstances, First Amendment protection is unavailable when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest...." Id. at 147.

Even if an employee successfully establishes that he or she spoke on a matter of public concern, courts must still consider "whether the employee's interest in the speech [is] outweighed by the employer's 'interest in the effective and efficient fulfillment of its responsibilities to the public....'" Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) (quoting Connick, 461 U.S. at 150), cert. denied, 484 U.S. 830 (1987). A public employer is not liable for infringing upon an employee's freedom of speech, even if the speech is a matter of

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[2] As discussed infra, the test articulated in Pickering and Connick is the proper test to be applied to Olivo's claim.

legitimate public concern, if the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public, on balance, outweighs the employee's interests in engaging in the speech activity. Jones v. Dodson, 727 F.2d 1329, 1336 (4th Cir. 1984) (citing Connick, 461 U.S. at 150-51).

By way of instruction to courts engaged in balancing these interests, this Court in Connick held "[t]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." Connick, 461 U.S. at 151-52 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974)(Powell, J. concurring)). "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151.

A. The Fourth Circuit Correctly Ruled That Petitioner's Speech Was Not Entitled To First Amendment Protection Because It Was Not Related To A Matter Of Public Concern.

Speech is only constitutionally protected if it relates to matters of public

concern. Piver v. Pender County Board of Education, 835 F.2d 1076, 1078 (4th Cir. 1987), cert. denied 487 U.S. 1206, (1988). When determining whether an employee's speech relates to a matter of public concern, courts:

> do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, [courts must] decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Terrell v. University of Texas Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987).

For these reasons, the Fourth Circuit correctly held that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Olivo v. Mapp, No. 94-2279, slip. op. (4th Cir. June 8, 1995)

(*Per Curiam* Opinion reversing the District Court) (quoting Connick, 461 U.S. at 148, n.8).

In Gillum v. City of Kerryville, 3 F.3d 117 (5th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 881 (1994), the plaintiff police officer claimed that he was terminated as a result of his involvement in an informal investigation of this police chief. In ruling that the plaintiff's speech did not relate to a matter of public concern, the Fifth Circuit held:

> Whether [the police chief] broke the law is of public concern, but that was not [the officer's] focus . . . . To be sure, corruption in an internal affairs department is a matter of public concern. [The officer's] focus was, however, on this issue only insofar as it impacted his wish to continue his investigation.

Id. See also McMurphy v. City of Flushing, 802 F.2d 191, 196-98 (6th Cir. 1986) (Police officer's accusations against his superiors did not touch upon a matter of public concern).

In Langlotz v. Picciano, 683 F. Supp. 1041 (E.D. Va. 1988), aff'd. 905 F.2d 1530 (4th Cir. 1990), the plaintiff, after being reprimanded by his employer (a public entity), responded by writing his employer

a letter accusing it of violating his constitutional right to freedom of speech and freedom of religion. After the public employer discharged the plaintiff, he filed suit claiming retaliatory discharge. The Court held as a matter of law that the plaintiff's letter, because of the context in which it was written, did not relate to a matter of public concern, but rather evidenced an employee grievance. Id. at 1050. Accordingly, the Court dismissed the suit.

The Fourth Circuit correctly held that Olivo's speech was by no means an attempt to bring Mapp's alleged practices to the public's attention. Olivo never attempted to communicate his grievance to the public at large. Rather, he spoke only to Corporal Small (regarding the crab feast) and Norfolk Police Officer Burt Williams (regarding his neutrality in the election). In fact, Olivo only spoke to Officer Williams because Officer Williams specifically inquired about his plans to attend the crab feast and his views on the election. In short, none of Olivo's actions evidenced any intent on his part to "go public" with his grievance. Rather, he privately communicated his concerns to two fellow law enforcement officials. While Olivo's speech may have achieved public concern status if it had been expressed under different circumstances, Connick clearly instructs

that speech "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Connick, 461 U.S. at 148 n.8. See also Lipsey v. Chicago Cook County Criminal Justice Comm'n., 638 F. Supp. 837, 842 (N.D. Ill. 1986), aff'd. 815 F.2d 708 (7th Cir. 1987), cert. denied, 479 U.S. 848 (1986) (Plaintiff's allegations that supervisor was racially biased, made during the course of a salary dispute, did not deal with a matter of public concern).

Not only did Olivo fail to express his views publicly, he did not even make his views well known within the Sheriff's Department. Because Olivo failed to establish that his speech addressed a matter of public concern, the Fourth Circuit Court of Appeals properly concluded that Sheriff Mapp could reasonably (and correctly) have concluded that Olivo's speech did not relate to a matter of public concern. Accordingly, the Fourth Circuit correctly found Sheriff Mapp to be entitled to qualified immunity.

B. Sheriff Mapp Was Entitled To Qualified Immunity Because He Could Reasonably (And Correctly) Have Believed That His Mandate To Maintain Discipline And

Promote Loyalty Among His Deputies Justified His Decision To Discharge Olivo.

"There are special concerns in the area of law enforcement that allow for greater restrictions on the expression of public employees." Benson v. Allphin, 786 F.2d at 268, 278 (7th Cir. 1986), cert. denied, 479 U.S. 848 (1986); see also Jurgensen v. Fairfax County, Va., 745 F.2d 868, 880 (4th Cir. 1984). "Police departments 'regardless of the historical origin,' are 'paramilitary organizations' and the free speech rights of employees in those departments must thus be evaluated with the special character of the organization in mind." Jurgensen, 745 F.2d at 880.

In light of Sheriff Mapp's role as the head of a paramilitary organization, his right to restrict the First Amendment rights of his employees is broader than other governmental employers. Conversely, the plaintiff's free speech rights are more limited than other governmental employees.

For these reasons, numerous cases in the Fourth Circuit and elsewhere have upheld the right of a sheriff to discharge a deputy based on political considerations. In Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987), cert. denied 484 U.S. 830 (1987), the Fourth Circuit held that a North Carolina

sheriff had lawfully discharged one of his employees for opposing his candidacy for reelection. In Joyner the Fourth Circuit noted: "[t]here is no question in this case that [Plaintiff's] political activity was the cause of his discharge." 815 F.2d at 22. The Court held, however, that the sheriff's interest in the efficient operations of his department outweighed the plaintiff's right to campaign against him. Id. at 24. Accordingly, the Fourth Circuit upheld the dismissal of the employee's action.

In Upton v. Thompson, 930 F.2d 1209, (7th Cir. 1991), cert. denied, 503 U.S. 906 (1992), the Seventh Circuit granted qualified immunity to a sheriff who had been sued by his former deputies. The deputies claimed that their discharges were impermissibly motivated by their political party affiliation. The Seventh Circuit held:

> The propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting and confusing treatment. . . . The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which the [defendant sheriffs] (absent a direct holding on this

> issue) could have no clear understanding as to whether the deputy sheriffs had any constitutional protection from a political based discharge. The lack of clarity on this issue . . . necessarily extends the protection of qualified immunity to the [defendant sheriffs].

Id. at 1212-13 (emphasis supplied).

In Dimmig v. Wahl, 983 F.2d 86, 87 (7th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 176 (1993), the Seventh Circuit concluded that a sheriff did not violate his employee's First Amendment rights by discharging a deputy for refusing to assist in his reelection campaign. Specifically, the Seventh Circuit held: "[Plaintiff's] complaint lacks merit because the constitution permits [the sheriff] to discharge [Plaintiff] for refusing to campaign for him." Id. at 87.

In Pierson v. Gondles, 693 F. Supp. 408 (E.D. Va. 1988), the Court granted qualified immunity to a sheriff who demoted low level, non-policy making deputies who allowed their names to be used on a campaign flyer for the incumbent sheriff's challenger and played active roles in the challenger's campaign. The Court in Pierson correctly concluded that the law was not clearly established that the sheriff had violated

his employees' constitutional rights. Id. at 415.

In Whited v. Fields, 581 F. Supp. 1444 (W.D. Va. 1984), the Court held that a newly elected sheriff in Virginia can constitutionally replace his deputies because of their failure to support his candidacy in a reelection campaign. After a detailed analysis of the sheriff's responsibilities under Virginia law, the Court concluded that the sheriff "should have complete and unfettered control over who his deputies are ... ." Id. at 1455.

As the Seventh Circuit noted in Upton, "[t]he propriety of politically based firings of deputy sheriffs (as well as other positions) has received conflicting confusing treatment." Upton, 930 F.2d at 1212-13. Given the rulings in Joyner, Upton, Dimmig, Pierson and Whited, and given the difficulties inherent in predicting the outcome of any court's application of the Connick balancing test (see infra), Sheriff Mapp could reasonably have believed that he could legally discharge Olivo for disloyalty. As public officials are not held liable for bad guesses in murky areas of law, the Fourth Circuit correctly granted qualified immunity to Sheriff Mapp in this case.

II. THE FOURTH CIRCUIT PROPERLY APPLIED CONNICK V. MYERS TO THE PETITIONER'S CLAIM.

In Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968), the United States Supreme Court set forth the standard to be applied when a public employee alleges, as in the present case, that he was discharged because of expressive conduct. In Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980) this Court set forth a different standard to be applied in cases where a public employer discharges an employee solely because of the employee's political party affiliation. See Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984); McBee v. Jim Hogg County, Texas, 730 F.2d 1009, 1014 (5th Cir. 1984)(en banc).

In the 1984 case of Jones v. Dodson, the Fourth Circuit confirmed that the Connick-Pickering test applies to cases such as the instant one where the plaintiff alleges retaliation for specific, overt expressive conduct. In distinguishing Connick-Pickering from Elrod-Branti, the Court held that Elrod and Branti only apply only to those rare cases involving discharge "solely because of the employee's political party affiliation". Id. at 1334. Specifically, the Court held:

> [Our interpretation of the Elrod-Branti test] deliberately

states the Elrod-Branti principle in terms narrowly confined to the specific facts of those cases, each of which involved discharges concededly based only upon the employees' party affiliations. We recognize that the principle might be thought to run as well to coerced political loyalty to individual employers (even of the same political party). . . . The effect of such an extension of Elrod-Branti patronage discharge principles would be, however, necessarily to carry over to other discharges than those solely for party affiliation, the extremely narrow justification basis defined in Branti. We do not believe that test is suited to the 'personal political loyalty' situation; it is too narrow. While it may adequately protect the only conceivable governmental interest in ensuring same-party affiliation of a public employee, it is not flexible or broad enough to protect governmental interests in avoiding a variety of employee 'expressions' involving

specific insubordination or dereliction of duty having a 'political' tinge, or, conceivably, deliberately given a 'political' cloak.

We therefore believe that raw patronage discharges of the Elrod-Branti type are properly treated as a narrow, special case within the wider category of first amendment discharges. Only in this narrow circumstance may the requisite balancing of governmental and individual interests appropriately be accomplished by the essentially rigid Branti inquiry. In the raw patronage situation both the individual and governmental interests are essentially fixed and unvarying in content. Balancing those interests from case to case does not require open-ended inquiry concerned with specific workplace relationships that may underlie overt expressive conduct. Where the protected activity involves overt 'expression of ideas,' the more open-ended inquiry prescribed by Pickering and its progeny are required to accomplish the necessary

> balancing. This is so even where the arguably protected activity involves 'political' speech or expression, particularly when the political speech impinges directly upon employee-employer relationships.

727 F.2d at 1334-35 n.6, (emphasis supplied) (citations omitted).

Petitioner's Complaint alleges that the Plaintiff was discharged for "expression(s)". Petitioner's Complaint does not allege a discharge based on political party affiliation. In fact, Petitioner told Officer Williams that he was neutral with respect to the upcoming election. Any reasonable Virginia sheriff in Sheriff Mapp's position at the time in question would have concluded (correctly) from this passage that the propriety of such a discharge would have been analyzed under Connick-Pickering.[3]

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[3] Even if Petitioner's claim is addressed under the Elrod-Branti test, Sheriff Mapp could reasonably (and correctly) have believed that he could discharge Petitioner for disloyalty under the authority of Whited v. Fields, 581 F. Supp. 1444 (W.D.Va. 1984). In Whited, the Court applied Elrod-Branti and upheld a sheriff's discharge of the majority of his deputies because they did not support him in an election. Although Petitioner argues that Whited was bad law at the time of his discharge in light of Jones v. Dodson, 727 F.2d 1329, 1338 (4th Cir. 1984), Whited was

III. QUALIFIED IMMUNITY HAS BEEN CONSISTENTLY GRANTED TO CLAIMS ANALYZED UNDER CONNICK V. MYERS.

At least six Circuit Courts of Appeals have concluded that because the Supreme Court's decision in Connick turns upon a fact-intensive balancing test, it can rarely be considered "clearly established" for the purposes of qualified immunity. Bartlett v. Fisher, 972 F.2d 911, 916 (8th Cir. 1992); Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), cert. denied 479 U.S. 848 (1986); Guercio v. Brody, 911 F.2d 1179, 1183-85 (6th Cir. 1990), cert. denied 500 U.S. 904 (1991); Melton v. City of Oklahoma City, 879 F.2d 706, 728-29 (10th Cir. 1989), overruled on other grounds, 928 F.2d 920 (10th Cir. 1991)(en banc); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1324 (11th Cir. 1989); Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021, 1024 (5th Cir. 1988).

In Bartlett, the Eighth Circuit stated:

> It would appear that, whenever a balancing of interests is required, the facts of the existing case law must closely correspond to the contested

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decided after Jones cited Jones. Thus, Sheriff Mapp could reasonably have relied upon it in deciding to discharge Petitioner.

> action before the defendant official is subject to liability under . . . Harlow. With Harlow's elimination of the inquiry into the actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.

Bartlett, 972 F.2d at 916 (citing Benson, 786 F.2d at 276.).

In Noyola, the Fifth Circuit granted qualified immunity to a public employer in a First Amendment case under Connick stating:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights. Connick and Rankin exemplify the difficulty of delineating any bright-line constitutional rule that might furnish a test for

> denying qualified immunity in such actions . . . . [R]easonable government officials, knowing only that they must not infringe on [employee free speech rights], would not necessarily know just what conduct was prohibited.

Noyola, 846 F.2d at 1025.

Because of the Connick balancing test, there will rarely be clearly established violations of employee constitutional rights. "Hence, even if [the plaintiff's] 'speech' was protected by the First Amendment, we . . . hold that neither the 'contours' of the rights were so clearly outlined nor was the `unlawfulness' of terminating [the plaintiff] so 'apparent' that [the public employer] should forfeit their qualified immunity." Id. at 1026.

In Benson, the Seventh Circuit commented:

> [t]he particularized balancing required by Pickering [and Connick] is difficult even for the judiciary to accomplish. Therefore, while it may have been clear since 1968 that a citizen does not forfeit his first amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual

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situation has not been well defined.

Benson, 786 F.2d at 276. In granting the public official qualified immunity, the Seventh Circuit noted, "[g]overnment officials must be granted the ability to pass unmolested through bogs of murky legal precedent." Id. at 276, n.17 (quoting Murray v. Gardner, 741 F.2d 434, 440 n.2 (D.C. Cir. 1984), cert. denied 470 U.S. 1050 (1985)).

The Tenth Circuit has stated, "[b]ecause a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate, it follows that where Pickering balancing is required, the law is less likely to be well established than in other cases." Melton, 879 F.2d at 729. In finding partial qualified immunity, the Tenth Circuit held: "[t]he balancing of these competing interests would not have been so clear to a reasonable official under these circumstances that we can say it constituted 'clearly established law' under Harlow. We cannot expect individual defendants to have understood at the time of [plaintiff's] discharge that it was unconstitutional to fire [plaintiff] for his communications . . . ." Id.

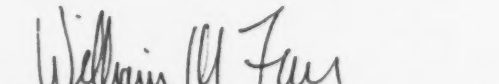
The Eleventh Circuit has similarly noted that "there will rarely be a basis for an a priori judgment that the termination or

discipline of a public employee violated 'clearly established' constitutional rights." McDaniel v. Woodard, 886 F.2d 311, 314 (11th Cir. 1989) (quoting Novola, 846 F.2d at 1025). As these six Circuit Courts of Appeal have noted, the law regarding the speech rights of public employees is in no way clearly established. Given the inherent uncertainty surrounding the outcome of any Connick balancing exercise and the case law (from the Fourth Circuit and elsewhere) specifically upholding the right of a sheriff to discharge a deputy who did not support him politically, it is simply not the case that the law applicable to 0Sheriff Mapp's actions was clearly established. Accordingly, the Fourth Circuit correctly granted Sheriff Mapp qualified immunity.

CONCLUSION

For the foregoing reasons, Respondent David K. Mapp, Jr. requests this Court to deny the petition for a grant of certiorari.

Respectfully submitted,



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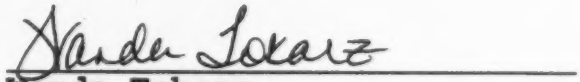
CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested original and forty (40) copies of the foregoing Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and mailed three (3) copies to counsel of record for the Petitioner, Bradley P. Marrs, Meyer, Goergen & Marrs, Hamilton Place, Suite 208, 1301 Hamilton Street, Richmond, Virginia 23230-3959 on November 9, 1995.



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